No. 4679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLYMPIA CANNING COMPANY,
a corporation,
Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE COMPANY,
LTD., a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Closing Brief for Defendant in Error.

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In its reply brief (as on the oral argument) plaintiff in error has completely shifted its position. In its opening brief, it clearly and definitely took the position that *a sinking alone* was a peril of the sea (see pp. 13, 14, 25, 34, 40, 42). It *now* takes the *new* position that, while foundering alone is *not* a sea peril, yet, if a vessel is seaworthy when the policy attaches and "some unexpected and unforeseen event occurs there-

after during the course of the voyage, which changes her condition, and which event in conjunction with the action of the sea, whether calm or tempestuous, causes the vessel to founder", then the loss becomes one by sea perils (brief, p. 6). Appellant then reaches the conclusion that the negligent overloading of the vessel at Tacoma *was* such an event. In other words, its contention is that loss *caused by overloading* is a loss by sea perils.

We submit that, to adopt the contention in question, would be to greatly broaden the general understanding of the term "perils of the sea" and to revolutionize the law of marine insurance. Although the courts have apparently departed from the early view of the Supreme Court that perils of the sea comprise losses "from *extraordinary* occurrences only" (*Hazard* case, 8 Peters 557, 585) and they now include "*severe* storms, *rough* seas and even fogs" (*Aetna* case, 273 Fed. 5), they have not yet, we submit, reached the point where they will hold that a sinking from "the ordinary action of the winds and waves" is insured against. In fact, under the express terms of the English Marine Insurance Act, such a loss is *not* covered by the policy.

We again wish to make clear the distinction made in our opening brief on this point. If a loss *is* caused by sea perils, then it makes no difference that the loss would not have occurred but for some act of negligence by the crew (as in *Dixon v. Sadler* and *Redman v. Wilson,* distinguished in our opening brief, pp. 27 and 29), or by the vessel being unseaworthy, when there is

no warranty of seaworthiness (as in *Dudgeon v. Pembroke*). We further contend, however, that, if no sea perils are encountered and the loss is caused *solely* by the unseaworthiness of the vessel or the negligence of the crew, then the loss is not a loss by sea perils and is not recoverable (see cases cited in our opening brief, pp. 18 to 25).

Plaintiff in error has, in its reply brief, cited a number of new cases, i. e. new in this court. All of them were cited in the briefs in the lower court, but some were excluded from plaintiff's opening brief (for what reason we are unaware). We shall briefly refer to these cases in the order in which they are cited.

In *Davidson v. Burnand,* L. R. 4 C. P. 117, recovery was allowed through the vessel's sea cocks or valves being left open below the water line, so that, when she got down to that point, the sea water flowed in and damaged the cargo. We believe that this case is to be distinguished by its having been decided prior to the passage of the Marine Insurance Act and we doubt whether it would be followed today. The decision seems to us contrary to the cases cited in our opening brief (pp. 18-25) and to the views of the House of Lords in *Frazer v. Pandorf* and *P. Samuel & Co. v. Dumas,* hereinafter referred to, and an expressly contrary result was reached in *Mannheim Ins. Co. v. Clarke,* 157 S. W. 291 (cited in our opening brief), where the court, after a review of both English and American law as to the meaning of the term "perils of the sea", said (at p. 298):

> "Authorities on this point might be multiplied, but we think that these quoted are sufficient for the conclusion that the sinking of the tug Seminole, proximately caused by the negligence of some member or members of its crew in failing to close the sea valve, was not a loss due to the 'adventures and perils of the harbors, bays, sounds, seas, rivers', etc., and therefore the loss was not covered by the policy sued on."

In that case the lower court instructed the jury that perils of the sea "denote *the natural accidents peculiar to those elements which do not happen by the intervention of man, nor are to be prevented by human prudence*" —a definition in almost exact accordance with definitions given by the House of Lords in the two cases above mentioned.

The *Davidson* case is, however, clearly distinguishable on its facts, as the *failure* to close the sea cocks (which at the time were above the water) was quite different from the affirmative action of the master of the "Rubaiyat" in overloading his vessel. In the case at bar there was no leak of any kind and the vessel simply toppled over from the weight of her own cargo.

Frazer v. Pandorf, 12 App. Cases 518 (examined by us as reported in VI Asp. Mar. Cases 212), involved the entrance of water into a seaworthy ship through a hole gnawed by rats. This was considered a fortuitous accident or casualty of the sea, for which no one was to blame, whereas in the case at bar the ship became unseaworthy through overloading and such unseaworthiness directly caused her loss. Lord Bram-

well in the *Pandorf* case (VI Asp. at p. 214) expressly approved the definition of Lopes, L. J., in the lower court that a peril of the sea is "a sea-damage occurring at sea, and nobody's fault" (this language also being cited with approval by the House of Lords in *P. Samuel & Co. v. Dumas,* 29 Com. Cases at p. 250).*

The opinion of Judge Lopes is reported in full in V Asp. Mar. Cases 568, and he there says in part (at p. 570):

> "It seems, therefore, that directly the real or effective cause of the loss is some act of man, the loss cannot be ascribed to 'dangers or accidents of the sea'."

This language, twice approved by the House of Lords, would clearly exclude the loss in the case at bar, which was caused by the gross negligence of the master of the "Rubaiyat"—plainly "an act of man" and not a "fortuitous accident or casualty of the sea".

The next case cited by plaintiff is *P. Samuel & Co. v. Dumas,* 29 Com. Cases 238, in which, as has already been noted, the definition of sea perils as "a sea-damage occurring at sea and nobody's fault" is expressly approved (opinion of Viscount Cave at p. 250). This case when examined will be found to be strongly in defendant's favor. One of the suits involved was by an innocent mortgagee and, as stated by plaintiff, Lord Sumner held that, as against the mortgagee, the

*NOTE: Of course this language, as used by the House of Lords, does not refer to stranding or collision cases, which rest on different principles (see our opening brief, p. 29), but it applies with peculiar force to the case at bar.

scuttling was a loss by sea perils. *All* of the other judges in the House of Lords, however, held to the contrary and the decision on this point is nowhere better expressed than by Viscount Finlay (at pp. 256-257):

> "The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the sea water, and that this is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed (see 'Arnold on Marine Insurance', section 799). *When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea.* It is true that the vessel sunk in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss. Exactly the same reasoning applies to the case of scuttling, the hole is there made in order to let in the water. The water comes in and the vessel sinks. The proximate cause of the loss is the scuttling, as in the other case the unseaworthiness. *The entrance of the water cannot be divorced from the act which occasioned it.*"

It will be noted that Lord Finlay expressly likens the inrush of the sea water caused by the scuttling to an inrush due to unseaworthiness and cites the *Sassoon* case on this very point. It is respectfully submitted that, in the case at bar, the capsizing of the "Rubaiyat" cannot "be divorced from the act which occasioned it".

The case of *Cohen v. National Benefit Association,* 40 Times Reports 347, was a case of an insurance on a submarine while being dismantled and was against "all and every risk", which, of course, covered the situation (see defendant's opening brief, p. 17). The case is not satisfactorily or fully reported and we are not at all satisfied that the court used the language quoted on page 16 of appellant's brief and, if it did, it was pure dicta. Moreover, perils of the sea, while *dismantling* a submarine, might obviously be very different from such perils in other cases.

The other cases cited by plaintiff have already been commented on in our opening brief or else need no comment.

Plaintiff implies in its brief (p. 18) that, in a case like that at bar, the shipowner is protected by the Harter Act and, if the insurance company is not held liable, the shipper is left to bear the risk alone. But the damage in this case and like cases is caused by *improper stowage* and *unseaworthiness,* for which, under the Harter Act, the ship is expressly made liable and the result in question therefore does not follow. Overloading is an entirely different thing from faults or errors of navigation. And we think it may be asserted as a general principle that where, as in this case, the carrier is liable, the underwriter is usually *not* liable.

Plaintiff complains of our claim that the finding of the lower court that the loss was not caused by perils

insured against is conclusive. It will be noted that in our opening brief (p. 9) that contention is confined to the currents encountered by the vessel and the court's finding that those currents were not sea perils *is* conclusive. Plaintiff says that "these tide rips and cross currents create a more or less *abnormal* and *dangerous* condition of the sea" (brief, p. 19). The word "tide rips" does not appear anywhere in the findings and the lower court clearly found that the *currents* were *not* abnormal and *not* dangerous, for, if they had been abnormal or dangerous, the decision would have been different. The fact is, as pointed out by us, that the currents were "well known" and operated on *all* vessels *ever* leaving Tacoma and the question whether they were perils of the sea was a question of *fact* depending on the evidence and, as to which, the findings below are conclusive.

Of course, however, if *overloading* a vessel is a peril of the sea, as plaintiff now contends, the court's finding on *that* point *is* a conclusion of law.

We respectfully submit, in closing, that the overloading of a vessel so as to make her "topheavy, unstable, tender and unfit" (Record, p. 36)—in other words, unseaworthy—is *not* a peril of the sea. We further submit that a loss due *solely* to unseaworthiness, as this loss was, is *not* a loss caused by sea perils and that it matters not whether that unseaworthiness was present when the policy attached or was later brought about by the gross neglect of her master. It it quite true that plaintiff's goods were damaged by

salt water, but "THE ENTRANCE OF THE WATER CANNOT BE DIVORCED FROM THE ACT WHICH OCCASIONED IT".

Dated November 20, 1925.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, S. Hasket Derby, hereby certify that I made service of the above closing brief by mailing three copies of the same to W. H. Bogle, Lawrence Bogle and Frank E. Holman, attorneys for plaintiff in error, at their office 609 Central Building, Seattle, Washington, this 20th day of November, 1925.

S. HASKET DERBY,
Of Counsel for Defendant in Error.